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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 548.

A. J. ZAYATZ, *Petitioner,*

v.

SOUTHERN RAILWAY COMPANY, a corporation, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINION OF THE COURT BELOW.

The opinion of the court below sought to be reviewed has not yet been officially reported. It is reported in 26 So. (2d) 545, and it will be found in the record at pages 25 to 31, both inclusive.

JURISDICTION OF THIS COURT.

Respondent submits that this Court is without jurisdiction to grant the petition and to review by certiorari the judgment of the court below, because that judgment is a purely interlocutory judgment, affirming the action and judgment of the trial court in overruling a demurrer to the complaint and amended complaint and in denying petition-

er's motion to dissolve an interlocutory injunction *pendente lite* issued to preserve the *status quo* and to preserve the trial court's jurisdiction over the main cause pending its final determination.

The judgment of the court below sought to be reviewed is in no sense a final judgment or decree or a final determination of the cause.

The only statute invoked by the petition and supporting brief as the basis for jurisdiction of this Court is Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 937, 28 U. S. C. 344 (b), which is insufficiently paraphrased (Petition, 2; Brief, 12) and quoted (Brief, 15), in that, in each instance, the statutory requirement of finality of the State court judgment or decree is omitted.

The said jurisdictional statute, in so far as here pertinent, and as amended by the Act of January 31, 1928, Chapter 14, 45 Stat. 54, abolishing writs of error and substituting appeals, provides:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party * * * under * * * any * * * statute of * * * the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied * * *."

This requirement, that the judgment of the State court sought to be reviewed be *final*, dates from 1789 and has an historical ground in the avoidance of conflict between the courts of two different governments. It is not a technical-

ity to be easily scorned. It is an important factor in the smooth working of our federal system. *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 123-124.

It means that the judgment sought to be reviewed must be final in two senses: "it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co.* v. *Comm'n*, 324 U. S. 548, 551.

The Supreme Court of Alabama is, of course, the "final court" in that state. However, it has here said no "final word." Its judgment is not "an effective determination of the litigation." It affirms only "merely interlocutory or intermediate steps therein." On this record no court of Alabama, neither the trial court nor the Supreme Court, has said a final word or effectively determined the litigation.

STATEMENT OF THE CASE.

The only facts of record are those alleged in respondent's bill of complaint (R., 2-9) and amendment to bill of complaint (R., 20-21) and admitted by petitioner's demurrer (R., 17-19). In so far as necessary to disposal of the present petition, they are:

Respondent here, complainant in the trial court, is a Virginia corporation, legally qualified to do business in Alabama. It is and was engaged in business as a common carrier by railroad, engaged in commerce between the States. (R., 2, par. I)

Petitioner here, respondent in the trial court, is a citizen and resident of Alabama, over the age of twenty-one years (R., 2, par. II).

To correspond to petitioner's designation of the parties, we shall hereinafter refer to petitioner as "Zayatz" and to respondent here as "Southern."

On February 28, 1945, Zayatz, while employed as a switchman by Southern and while engaged in such employment, in interstate transportation or in work so closely related to it as to be practically a part of it, suffered serious and permanent injuries at Sheffield, Alabama, such as, if caused by Southern's negligence, gave him a cause of action in tort for damages under the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. 51, *et seq.* (R., 2, par. III).

On April 12, 1945, in Florence, Lauderdale County, Alabama, the place of his residence (R., 2, par. II), Zayatz agreed with Southern upon a settlement of all his claims, demands, actions, or rights of action against it by reason of said injuries, accepted from it a payment of $10,000, and, in consideration thereof, executed and delivered to it a fully executed contract of release (R., 3, par. IV; R., 7-9, Exhibit "A" to Bill of Complaint).

Thereafter, through an attorney at law of St. Louis, Missouri, Zayatz notified Southern that he desired to repudiate and rescind his said contract of release and threatened to sue Southern for damages on account of said injuries in St. Louis, Missouri (approximately five hundred miles from Sheffield, Alabama, the scene of the accident), and where Southern would be put to great inconvenience, hardship, and expense to take witnesses and to produce evidence (R., 4, top, and R., 4-5, par. VI).

Thereupon there existed, and exists, an actual controversy between Southern and Zayatz as to whether the said contract of release constitutes a valid and binding contract of release and settlement (R., 3, par. V).

To determine that actual controversy as to the validity of that Alabama contract made with it by Zayatz, a citizen of Alabama, Southern brought this suit in the Circuit Court of Lauderdale County, Alabama, under the Uniform Declaratory Judgment Act of Alabama, Code of Alabama 1940, Title 7, Section 156, *et seq.*, the pertinent sections of which are set out in the appendix to this brief, for a declaration

of the respective rights of the respective parties under the said written contract (R., 6, prayers; R., 25-26, first four paragraphs of the opinion of the court below).

It is important to observe that petitioner Zayatz raises no question as to the constitutionality of this Alabama statute under the Constitution of the United States, as to its validity as being in conflict with any statute of the United States, or as to the jurisdiction of the trial court to entertain the suit or to proceed to final judgment declaring the respective rights of the parties under, and the validity or invalidity of, the said contract of release.

On the bill of complaint (R., 2-9) and a supporting affidavit (R., 9-13), the trial court, to preserve the *status quo* and to protect its jurisdiction pending final determination of the action, issued an interlocutory injunction *pendente lite* (R., 6-7, 13-14) restraining Zayatz from filing and prosecuting any suit or action against Southern based upon the said personal injuries covered by the said contract of release in controversy.

Zayatz moved to dissolve the injunction *pendente lite*, asserting that it violated a federal right of his under the venue provision of the Federal Employers' Liability Act to select his forum and institute his action in any court of the United States or of any state where valid process may be had upon Southern, regardless of inconvenience or hardship to it (R., 15-17). He also demurred to the bill of complaint on the same asserted federal ground and for want of equity, a plainly state ground (R., 17-19).

The petition here fails to recognize that the asserted federal right to select a venue of his own choosing is one which Zayatz was at perfect liberty to contract away by a valid contract of release. The issue in this case is merely as to the validity of that contract. If by a final judgment the Alabama courts hold the contract of release valid, that will be *res judicata* on Zayatz in any action he might bring under the Federal Employers' Liability Act. He will have lost his federal right of suit and selection of venue, not be-

cause of the interlocutory injunction *pendente lite*, but solely because he executed a valid contract of release.

On the other hand, if the Alabama courts by final judgment hold the contract of release invalid, then every federal right of Zayatz is not only safeguarded, but in fact greatly fortified. In that event, he is free to choose his forum and to bring his action under the Federal Employers' Liability Act, but, more than that, the final judgment of the Alabama courts holding the contract of release invalid will be *res judicata* on Southern, and it cannot rely on that contract as a defense in such suit.

After an amendment to the bill of complaint (R., 20-21), Zayatz filed a purely formal amendment to his motion to dissolve the injunction *pendente lite* (R., 21-22).

The trial court overruled the demurrer and the motion to dissolve the injunction *pendente lite* (obviously interlocutory orders) (R., 22-23), and Zayatz appealed to the Supreme Court of Alabama, the court below (R., 24).

The court below unanimously affirmed the interlocutory orders of the trial court, obviously an interlocutory and non-final order or judgment of the court below (R., 25-31).

THE JUDGMENT OF THE COURT BELOW.

Just what was before the court below and just what it decided is clearly shown in its opinion (R., 25-31).

It pointed out that this is not an action under the Federal Employers' Liability Act but is an action under the Uniform Declaratory Judgment Act of 1935, seeking to establish by judicial decree the validity of a contract fully executed by both parties and to have their rights and status thereunder declared (R., 25). It held that the trial court had jurisdiction under that statute, a holding of state law with which this Court is not concerned and which, indeed, petitioner Zayatz does not challenge (R., 25, bottom; R., 26, top).

It held that the appeal was from "an interlocutory decree" of the trial court "overruling the demurrer of defendant Zayatz to the bill * * * and his motion to dissolve the temporary injunction granted to preserve the *status quo pendente lite*" (R., 26, lines 4 to 9). It was such purely interlocutory and intermediate order which the judgment below affirmed (R., 31, bottom).

At one stage petitioner Zayatz argued in the court below that the declaratory judgment statute of Alabama authorized no more than a mere construction of a contract and did not authorize determination of disputed questions of fact (R., 28, second full paragraph). However, that position was withdrawn by his reply brief below (R., 31, last paragraph but one).

The court below held the issue in the case to be a justiciable controversy (R., 30, top). It pointed out that by the allegations of its bill Southern had assumed the burden of showing that "Zayatz, with full understanding of the nature and extent of his injuries, executed the release freely without deception or coercion," and that in proceeding to final judgment on that issue the courts of Alabama will apply federal rules as to burden and quantum of proof to determine any issues that may arise under the Federal Employers' Liability Act (R., 30).

ARGUMENT.

This Court is without jurisdiction to grant the petition since the judgment of the court below sought to be reviewed is not a final judgment.

It is clear that the judgment sought to be reviewed is an interlocutory or intermediate order by the court below affirming an interlocutory order of the trial court, which does not say the final word upon any issue in the case, and which in no way finally adjudicates the case, and that this Court is without jurisdiction to grant the writ under the jurisdictional statute (see pp. 2-3, *supra*) and under *Market*

Street R. Co. v. *Comm'n,* 324 U. S. 548, 551, and *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 123-124.

Petitioner's brief, at pages 15 to 17, recognizes the necessity of finality of judgment for review under Section 237 of the Judicial Code, 28 U. S. C. 344 (b), and undertakes to assert that the effect of the overruling of petitioner's demurrer and motion to dissolve the interlocutory injunction *pendente lite* is finally to take away from him his federal venue right, contrary to the holdings in *Baltimore & Ohio R. Co.* v. *Kepner,* 314 U. S. 44, and in *Miles* v. *Illinois Central R. Co.,* 315 U. S. 698.

But that can be so only on the unwarranted assumption that he will lose this case on the merits when the Alabama courts proceed to final judgment. If he prevails on final judgment, as we have pointed out, not only are all his federal rights fully preserved, but Southern will be bound by the holding of invalidity of the contract of release and cannot rely on it as a defense to his action under the Liability Act.

An interlocutory and non-final judgment against petitioner Zayatz cannot be converted into a final one by the simple expedient of presuming that the court of his home state and county will ultimately issue a final judgment against him.

If such final judgment should ultimately go against him, his rights under the Liability Act will have been destroyed, not because the Alabama courts have issued against him an injunction *pendente lite,* but because he settled and released those rights by a valid contract which he was perfectly competent to make and which no provision in the Federal Employers' Liability Act stood in the way of his making.

It is idle to suggest that the judgment below should be treated as final in effect because of the purely speculative hypothesis that, conceivably, if Southern and the Alabama courts are dilatory enough, the injunction *pendente lite* might remain in force throughout the entire three-year pe-

riod of limitation of the Liability Act (R., 20-21). And such a contention hardly lies in the mouth of Zayatz, when at the moment it is he who has stayed proceedings in the Alabama courts (R., 37-38) while he engages in the delay incident to attempting to have this Court review an interlocutory and non-final judgment of the Alabama court.

For all the reasons and upon the authorities above set out, we respectfully pray this Court to deny the petition.

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APPENDIX.

Alabama Code of 1940.
Title 7.

§ 156. **Scope.**—Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

§ 157. **Power to construe, etc.**—Any person interested under a deed, will, written contract, or other writings constituting a contract, of whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

§ 158. **Before breach of contract.**—A contract may be construed either before or after there has been a breach thereof.

§ 159. **Who may have declaration of rights, etc.**—Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in resepct thereto: To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or other; or to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fidu-

ciary capacity; or to determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

§ 160. **Enumeration not exclusive.**—The enumeration in the three preceding sections does not limit or restrict the exercise of the general powers conferred in section 156 of this title, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

§ 161. **When refusal proper.**—The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

§ 162. **Review.**—All orders, judgments, and decrees under this article may be reviewed as other orders, judgments and decrees.

§ 163. **Supplemental relief.**—Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

§ 164. **Jury trial.**—When a proceeding under this article involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

§ 165. **Costs.**—In any proceeding under this article the court may make such award of costs as may seem equitable and just.

§ 166. **Parties when declaratory relief is sought.**—All persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney-general of the state shall also be served with a copy of the proceeding and be entitled to be heard.

§ 167. **Construction of article.**—This article is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respects to rights, status, and other legal relations; and is to be liberally construed and administered. This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.